PUBLIC PROSECUTOR

v.

TAI MEI YUEN

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL TRIAL NO. 13/1982]
27 AUGUST 1985

CRIMINAL PROCEDURE: *Possession of firearms and ammunition - Section 57(1)(a), (b) of the Internal Security Act - Arrest - Interrogation - Statement leading to discovery - Section 27 of the Evidence Act - Admissibility of - Requirement of - Conflicting version of events - Whether prosecution had proven possession by the accused - Statements allegedly made to police - Whether probable and reasonable - Circumstances of the case - Arrest of accused as consequence of information given by accomplice - Whether knowledge constitutes possession - Circumstantial evidence.*

On 16 March 1982, one ASP Ganapathy acting on information, arrested a male Chinese, Lee and later took him to Police Headquarters for interrogation.

As a result of the interrogation, a police party raided a saloon wherein they found the accused, Tai Mei Yuen.

On conducting a body search, the police found nothing incriminating on the accused. Another person, Sow Heng Seang, nicknamed 'Bah Geh' was arrested along with the accused. Both were taken to the District Police Headquarters where one ASP Murad commenced the interrogation of the accused at length. It was alleged by the prosecution that as a result of the interrogation, the accused said to ASP Murad that "Saya simpan pistol di bilik sewa kawan saya dan saya boleh tunjuk tempat itu."

It was the further evidence of the prosecution that a party of police officers then proceeded to Jalan Kelab in Butterworth, with the accused. The accused accordingly led the police to the first floor of a shophouse where he pointed to the room which was then locked. The accused did not have the key to the room, therefore the police pried open the lock with a screw driver and opened the door. It was alleged that the accused pointed to a speaker box and said "Pistol itu simpan dalam kotak itu".

The police recovered a handgun, two revolvers and one automatic pistol. The police also recovered some bullets.

In his report, PW3, ASP Murad, did not quote or even give the substance to the words allegedly used by the accused at the Butterworth Police Station, which led to the recovery of the weapons.

The accused was prosecuted on the 2 charges. The first that he had on his possession firearms, without lawful authority and therefore committed an offence punishable under s. 57(1)(a) of the Internal Security Act 1960 and the second charge stipulated that he had in his possession ammunition of various calibres and thereby had committed an offence punishable under s. 57(1)(b) of the Internal Security Act 1960.

The Court was required to scrutinise PW3's evidence with the utmost care and to test it against the evidence of the surrounding circumstances, not disregarding, and also scrutinising at the same time, the version put forward by the accused himself.

The crucial issue in the case of both charges was whether the prosecution had proved possession by the accused of the offending exhibits referred to.

Held:

[1] It is trite law that although there is no legal requirement that statements under s. 27 of the Evidence Act must be taken down in writing, prudence demands that this is highly desirable.

[2] The statements made by the accused to PW3 would be inadmissible in law by reason of the failure of these two Special Branch Chinese Officers to testify.

[3] Without the statements allegedly made by the accused, the case for the prosecution collapsed, as there was nothing to connect the accused with the offending exhibits.

[4] The Court did not regard the testimony of PW3 as to the contents of these statements as inspiring confidence. There was no contemporaneous note made by him of these alleged statements and, though in law there was no such requirement, the Court considered, that from an evidentiary point of view, the Court was entitled to rely on the omission as an element which the Court could take into consideration in evaluating the testimony of PW3.

[5] The Court was suspicious of PW3's version as to this part of the case, by reason of the omission from his report, made on the date of the arrest, in which, although he refers to the statements made by the accused in the room, he made no mention whatsoever of the crucial statements allegedly made by the accused earlier that day in the interrogation Room at the Butterworth Police Station.

[6] The version given by the accused both with reference to what he said at the Butterworth Police Station and, in the room at Jalan Kelab was, in no way improbable or in any way unreasonable; especially as this so when one bears in mind the factual background of the instant case involving as it does, Lee and Bah Geh and the room which was not the accused's but occupied by more than one person. It was also a room which was locked when the police arrived and to which, as the Court has already said, the accused did not have the key.

[7] It is well settled law that mere knowledge does not constitute possession.

[8] Where the evidence is circumstantial, the Court is not at liberty to bridge any material gap in the chain of evidence for this would amount to relaxing the requirements of strict proof in a criminal case.

[9] The defence of the accused was reasonable and probable and more than sufficient to rebut the case for the prosecution.

[Accused acquitted and discharged.]

Cases referred to:

Pulukuri Kottaya & Ors. v. Emperor [1947] AIR 62
Haw Tua Tau v. PP [1981] CLJ (Rep) 11
Sum Kum Seng v. PP [1981] 1 MLJ 244
R. v. Attard 43 CAR 90
R. v. Hart 23 CAR 202
Yee Ya Mang v. PP [1972] 1 MLJ 120

Legislation referred to:

Evidence Act 1950, s. 27
Internal Security Act 1960, ss. 57(1)(a), (1)(b)
Penal Code, ss. 395, 397

For the public prosecutor - Ahmad Nasfy bin Yasin, Deputy Public Prosecutor
For Tai Mei Yuen - Prabhakaran; M/s. Prabha, Xavier & Associates

JUDGMENT

Edgar Joseph Jr J:

This accused was prosecuted before me upon the following charges:

1st charge:

That you on 19 March 1982 at about 11.45 a.m. at premises No. 1, Jalan Kelab, Butterworth, in the District of Butterworth, in the State of Penang, did without lawful excuse, in a security area, proclaimed by the Yang di-Pertuan Agong *vide* Gazette No. PU 148/69, have in your possession firearms, to wit, 1.38 Special Smith & Wesson No. 25236, 1 home made revolver and 1 Star Automatic pistol, without lawful authority thereof, and that you have thereby committed an offence punishable under s. 57(1)(a) of the Internal Security Act 1960.

2nd charge:

That you on 19 March 1982 at about 11.45 a.m. at premises No. 1, Jalan Kelab, Butterworth, in the District of Butterworth, in the State of Penang, did without lawful excuse, in a security area, proclaimed by the Yang di-Pertuan Agong *vide* Gazette No. PU 148/69, have in your possession 11 rounds of ammunitions, to wit, 1 round of .38, 1 round of 38 special, 4 rounds of Super X and 5 rounds of .25 Auto without lawful authority thereof, and that you have thereby committed an offence punishable under s. 57(1)(b) of the Internal Security Act 1960.

According to the evidence led by the prosecution, on 16 March 1982, at about 11.00 p.m., one ASP Ganapathy who was then officer in charge of Major Crimes, Penang, acting on information received earlier that day, arrested a male Chinese, namely, Lee Ah Shai ("Lee") near the eating stalls at Maclister Road and brought him to Police Headquarters for interrogation.

As a result of the interrogation, at about 1.30p.m., the following day, a party of police officers which included ASP Ganapathy, Superintendent Daud and Superintendent Mokhtar, took along with them, Lee, and left Georgetown for Butterworth Police District. On arrival there, they proceeded to the office of the Deputy OCPD (Crime). There, discussions were held, after which, they left to reconnoitre a saloon called "The Dreamland". The saloon was situated along Jalan Kampung Benggali and was in fact just opposite the Butterworth Police Station building, about one hundred yards away.

As a result of this exercise, it was established that the "target" was not in the saloon. So, the police party returned to Georgetown.

The next day, that is to say on 18 March 1982, at about 1.30 p.m., the same police party proceeded once again to the office of the CID Chief, Butterworth. At about 9.00 p.m., Superintendent Mokhtar instructed ASP Ganapathy and ASP Murad to maintain surveillance over the saloon while he, Chief Inspector Yeoh Kheng Hock and Lee would remain in the office of the CID Chief, Butterworth.

ASP Ganapathy had with him a walkie-talkie and, with it, was in communication with Superintendant Mokhtar. In this way, ASP Ganapathy had been instructed that Lee would be making a telephone call to the saloon and whoever answered the call, if confirmed by Lee, would be "the person to arrest."

At about 9.35 p.m., ASP Ganapathy received a message on the walkie-talkie from Superintendant Mokhtar "to go now". Accordingly, he immediately rushed into the saloon.

Upon entering, he and his party saw the accused speaking on the telephone. ASP Ganapathy after identifying himself as a police officer, conducted a search of the person of the accused but recovered nothing incriminating. He did, however, recover a car ignition key and with it opened the door of a car parked outside. Then a search followed of the car and again nothing incriminating was found but he observed that the car number on the Road Tax disc was different from its Registration number.

ASP Ganapathy immediately informed Superintendant Mokhtar of the arrest and, about twenty minutes later, the latter arrived at the saloon. A search was then conducted of the saloon but once again nothing incriminating was recovered. It is also pertinent to mention that another person was arrested along with the accused. His name was Sow Hong Seang (nicknamed "Bah Geh"), aged 21.

Both were then brought to the District Police Headquarters, Butterworth, where, on instructions from Superintendant Mokhtar, ASP Murad commenced interrogating the accused at length.

Later, at about 2.30 p.m. the next day, that is to say on 19 March 1982, together with Superintendant Mokhtar, ASP Ganapathy left for Ipoh to conduct investigations into another case.

Under cross-examination by Counsel for the defence, ASP Ganapathy confirmed that Lee, the man arrested at the Maclister Road stalls, had been charged with an offence of gang robbery, in the course of which he was alleged to have used a handgun. The relevant charge sheet was produced at the behest of the defence and, it disclosed, that Lee was indeed convicted on his own plea of guilty on a charge of gang robbery in contravention of s. 397 of the Penal Code and sentenced to four years imprisonment from date of arrest. That charge was in the following terms:

> That you together with another person still at large, on 12 March 1982, at about 11.20 p.m. in a shed at Thean Teik Road, in the District of Georgetown, in the State of Penang, committed gang robbery and at the time of committing the said robbery, you were armed with deadly weapons to wit, revolvers and that you have thereby committed an offence punishable under s. 395 of the Penal Code read with s. 397 of the said Code.

Also charged with Lee, on this occasion, were four others, all of whom, except the fifth accused, were convicted on their own pleas of guilty and sentenced to four years imprisonment. The fifth accused received a sentence of five years imprisonment.

The vital witness for the prosecution appeared to be ASP Mohamad Murad (PW3). He confirmed that he was a member of the party which raided the saloon on 18 March 1982 and, that following the arrest, he did interrogate the accused commencing on the night of 18 March 1982, and ending at 6.30 a.m. the following day. As a result, the accused, speaking in Malay, is alleged to have said to him, "Saya simpan pistol dibilik sewa kawan saya dan saya boleh tunjuk tempat itu."

As a result, ASP Mohamad Murad led a party of police officers, which included Inspector Boo Bak Teik, Inspector Leong Hock and Detective Sargeant Goh Ah Saai, to Jalan Kelab, Butterworth. On arrival there, the accused asked the police party to stop, whereupon, he pointed to an end shophouse being No. 1, Jalan Kelab. He was then taken out of the police car and asked to lead the party to the room concerned ("the room"). The accused accordingly led the party up the stairs leading to the first floor of the shophouse. On arrival there, he pointed out to the room which was then locked with a small padlock. The accused however did not have the key to this padlock. So, PW3 had to pick up a screw driver which was lying on one of the chairs close by and with it pried open the padlock and opened the door.

The accused entered the room first, followed by the police personnel. On entering the room, the accused pointed to a speaker box and is alleged to have said at the same time, "Pistol itu simpan dalam kotak itu." Upon being asked by PW3 to indicate which speaker box, as there were two in the room, the accused is alleged to have pointed at a box at the right side near the wall. PW3 then picked up this box (Exhibit P2), opened up the back of it and in it found a clutch bag (P3) which he unzipped and recovered from it three packages wrapped in an English newspaper. On opening these packages, he recovered from each a handgun, in particular, two revolvers and one automatic pistol.

One of the two revolvers was a Smith & Wesson (P4) with two bullets in the chambers. The other was a home made revolver (P5). The pistol was a Star automatic (P6). There were also recovered from the clutch bag, a number of bullets, to wit, four live bullets (P7A-D), one spent cartridge (P7E) and one test-fired bullet (P7F), eight test-fired .22 bullets (P8A-H), one .22 empty cartridge (P9), a plastic strip containing four spent bullets and five spent cartridges (P10A-I), another strip containing four empty .25 cartridges (P11A-D), and a plastic container with a piece of tissue (P12).

Under cross-examination, it was put to PW3 that the accused did not speak directly to PW3 during the interrogation but, through a Chinese Special Branch Officer, who was never called to testify. However, PW3 denied this.

It was also put to PW3 that the accused spoke very little Malay and, again, PW3 denied this adding that the accused spoke Malay very well and they had no difficulty understanding each other.

PW3 did however admit that he made no contemporaneous note as to what the accused said and that he was therefore relying on his memory for this.

The witness did however say that in his recorded statement dated 1 April 1982, that is to say some fourteen days after arrest, he did quote the words allegedly used by the accused in the Interrogation Room at the Butterworth Police Station, namely in Malay, "Saya simpan pistol itu di bilik sewa kawan saya di Jalan Kelab dan saya akan bawa tunjuk."

Be that as it may be, it is worth mentioning that in his report, PW3 did not quote or even give the substance of the words allegedly used by the accused at the Butterworth Police Station, which led to the recovery of the weapons although he did allude to what the accused said in the room of the shophouse, namely, "Apabila masuk ke dalam bilik, Tai Mei Yuen telah menunjukkan kepada saya satu kotak speaker dan mengatakan ada di dalamnya."

When questioned by the Court as to the reason for this omission, the witness explained that this was first case involving recovery of firearms, that although he had been first assigned to do CID work in 1979 when he was posted to the CID Headquarters, Pulau Pinang, as investigating officer for serious crimes, he first began doing investigations work only in February 1982.

It was put to PW3 in cross-examination that at the Butterworth Police Station, what the accused in fact told him through the interpretation of the Chinese Special Branch Officer was, "I can show you a place where my friend has kept his things" but PW3 denied this. Similarly, it was put to PW3 that in the room of the shophouse, the accused had said through the interpretation of the same Chinese Special Branch Officer, "Look into the speaker box" but PW3 denied this. He did however confirm that Bah Geh, the occupant of the room, who was arrested along with the accused, was not taken along with the accused to No. 1, Jalan Kelab.

The next witness to testify for the prosecution was Inspector Boo Bak Teik (PW4). He confirmed that he was a member of the police party which raided the room but, more importantly, he first testified in answer to questions by the Court, that when the accused pointed at the speaker box, he said to PW3, "The thing inside the speaker box." However, the witness was unable to give the exact words used and later acknowledged that he could not really hear properly what the accused said as the accused had merely whispered to PW3 but later did raise his voice, point to the speaker box and say, "Ada sana."

Under cross-examination however, PW3 admitted that the accused had not after all said that "the thing is inside the speaker box." He also admitted that he had never heard the accused use the word "pistol". When pressed as to whether there were two Chinese Special Branch Officers in the room at that time, he denied this.

It was next the turn of Detective Sargeant Goh Ah Saai (PW5) to testify for the prosecution. At first sight, this witness appeared to be purely formal as he went to the room to take photographs on 19 March 1982 at 11.30 a.m. on instruction of PW3. However, when he was unexpectedly cross-examined as to whether or not there were two Chinese Special Branch Officers in the room at that time, he said, after a long pause, obvious reluctance and visible embarrassment, "I am not sure. This was because I was preparing my camera."

That was the sum total of the evidence led by the prosecution.

I must, however, confirm that I had ruled, after objection taken, that the statement allegedly made by the accused which led to the recovery of the arms and ammunition, under s. 27 of the Evidence Act, regard being had to the principles enunciated by the Judicial Committee of the Privy Council in the quoted case of *Pulukuri Kottaya & Ors. v. Emperor* [1947] AIR 62, was *prima facie* admissible. This ruling was however made during the prosecution case and was, of course, open to review after hearing the evidence adduced by the defence. The significance of this point will become apparent later.

I also had to keep in mind that, in accordance with the principles enunciated in *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, it was not my task, up to the close of the prosecution case, to evaluate the credibility or reliability of the testimony of witnesses for the prosecution. That was a function for me to discharge only at the close of the case for the defence. Similarly, it was for this reason that I ruled that there was a case to answer.

The accused elected to give evidence on oath.

He confirmed that on 14 March 1982 at about 6.00 p.m., he was in fact at the saloon because his girlfriend worked there. While there, Lee walked in, appearing to be in a hurry and anxious to look for someone. Not being able to do so, he asked the accused if the latter had seen a person named Bah Geh. The accused replied that he had not done so but added that perhaps he might meet him later. The accused, then, offered to convey a message to Bah Geh. It was at this point, according to the accused, that Lee asked him to tell Bah Geh that he (Lee) had left something in his (Bah Geh's room) in a loud speaker box. The accused undertook to convey this message to Bah Geh if he saw him later.

The accused then touched on his relationship with Bah Geh. He said that he had been to Bah Geh's room previously on five or six occasions, each being a social visit. Bah Geh was his friend but he maintained that Lee was only an acquaintance. The accused confirmed his arrest at the saloon on 18 March 1982 and pointed out that also arrested with him was Bah Geh.

He then turned to his interrogation; first, by PW2 who spoke in Malay and next, as there were language difficulties, by Chief Inspector Yeoh Kheng Hock who was called in to act as Interpreter, using Hokkien as the medium of communication, which the accused said he understood.

During the interrogation, PW2 asked the accused, "Where did you keep the gun handed to you by Lee Ah Shai?" On hearing this, the accused claimed that he was taken back because he knew nothing about the gun. At the end of the interrogation, which lasted one hour, the accused said he was taken back to the saloon where a search was conducted in his presence but nothing incriminating recovered.

Upon being brought back to the Police Station at Butterworth, his interrogation was resumed at first by PW2 and later by PW3. He clarified that the interrogation was continued by two Chinese Special Branch Officers and that, at this stage, PW2 and PW3 had left. He added that these Chinese Officers were very persistent in questioning him about where he had allegedly left the guns handed to him by Lee. He said he knew nothing about that as Lee never in fact handed to him any gun. He alleged - and this was not challenged or contradicted by the prosecution - that he was denied sleep, rest and refreshment during his interrogation from 10.00 p.m. on 18 March 1982, to 9.00 a.m. the following day. He also alleged that he was required, most of the time, to do sit ups and that PW3 assaulted him by fisting him in the chest and also in the abdomen. As a result, he suffered great pain.

More importantly, he confirmed that he did lead the police party on the 19th to the room. This was because, throughout the night, the two Chinese Officers were asking him, "Where did you keep the gun handed to you by Lee Ah Shai?" He maintained that he had no knowledge of this but, because of the persistent questioning, it dawned upon him, that a few days earlier, Lee had spoken to him to convey a message to Bah Geh. That message, it will be recalled, was that Lee had left something in the room. Accordingly, the accused offered to take his interrogators to the room to find out for themselves as he had no knowledge what that "something" was. He insisted that he only spoke to a Chinese Officer, not to PW3, and that this Chinese Officer was not in Court during the trial. He quoted the exact words he used to the Chinese Officer and they were as follows: "I can take you to a room rented by my friend. You can then look for yourself what might be there." He categorically denied, saying to PW3, "Saya simpan pistol di bilik sewa kawan saya dan saya boleh tunjuk tempat itu." He explained, that at that time, he had a very limited knowledge of Malay and was not capable of using the words attributed to him by PW3.

He then described the events in the room. He said PW3 entered the room first followed by him and other members of the police party. Recalling the message Lee had asked him to convey to Bah Geh, he noticed a speaker box on the floor in the room, similar to P2.

He then said to the Chinese Special Branch Officer, in Cantonese, "Since you are looking for the things belonging to Lee Ah Shai, I wonder, perhaps, it might be in this box." This officer then spoke to PW3 who then dismantled the speaker box, recovering from it, the clutch bag (P3) which contained the offending exhibits. He said he was stunned by this discovery and became very frightened. He insisted that neither the guns nor the ammunition belonged to him. He added that when Lee asked him to convey the message to Bah Geh, he never suspected that the "something" were guns because, firstly, the "something" was not his and, secondly, the message was not meant for him. He denied that he told PW3, in Bahasa, when he went into the room, "Pistol itu simpan dalam kotak itu."

He confirmed, however, that it was indeed Lee who telephoned him at the barber's saloon just before his arrest on 18 March 1982 and it was this person who had asked him to convey the message to Bah Geh.

In answer to questions by the Court, he said it did not occur to him to take the police party to the room right from the start. This was because it did not then strike him that there was a connection between the guns they were looking for and the message he had received from Lee four days earlier. As far as he was concerned, it was just a message and he did not realise the significance until later when the offending exhibits were recovered. He clarified that the name "Lee Ah Shai" was put to him repeatedly and, as a result, the possible relevance of Lee Ah Shai having asked him to pass a message to Bah Geh, finally dawned upon him. He explained that when he was taken into the room, both his hands were handcuffed behind him; so he had to indicate the speaker box to the police by raising his chin in the general direction of one of the two speaker boxes which were similar. He explained that he raised his chin at random, indicating one of them, but not knowing at the time, what might be kept in the two speaker boxes which, although lying side by side near the wall, were apart. He could not say how far apart.

He acknowledged, in re-examination, that he did attend a National Type Chinese Primary School where Bahasa was taught as a subject for six years but maintained that his Bahasa was very poor but, since being in prison, he had become friendly with Malay inmates and, as a result, his Bahasa had improved.

I then had to evaluate the evidence for the prosecution and the defence in order to determine whether the charges had been proved against the accused beyond reasonable doubt.

Clearly, the lynch pin in the prosecution case was PW3. If his testimony as to what the accused told him and the consequent recoveries were accepted as a credible and accurate account, then, on this alone, a conviction on both charges would be justified.

It was therefore necessary to scrutinise PW3's evidence with the utmost care and to test it against the evidence of the surrounding circumstances, not disregarding, and also scrutinizing at the same time, the version put forward by the accused himself.

Now, it is trite law that although there is no legal requirement that statements under s. 27 of the Evidence Act must be taken down in writing, prudence demands that this is highly desirable. As Chang Min Tat FJ said, when speaking for the Federal Court, in *Sum Kum Seng v. PP* [1981] 1 MLJ 244, 245 Col. 2.

> ... while there is no strict necessity at law to give the actual words used by an accused person in supplying the information that led to the discovery of a fact or thing and comes within the provisions of s. 27, both the decisions referred to and commonsense stress the desirability that the actual words be recorded somewhere. The record is also as much for the protection of the particular officer concerned, be he the investigating or the interrogating officer, as for the purpose of determining its admissibility. We believe all police officers carry note books with them and we see no practical difficulty of any kind hindering any officer interrogating an accused person from jotting in his note book such a vital piece of information, on which the whole case against the accused may depend. It would not take him more than a minute or so. Ideally it should be done at the moment it was made. We appreciate that the immediate concern of the police is to recover the subject-matter of the information but we fail to see how a delay of a minute or so can make any material difference. Afterwards, the officer can refer to this note as the actual information given by the accused leading to the discovery of the fact. The note may, of course, be made afterwards but as we have said, we can see no

reason why it should not have been made at the time the information was given and why the police officer should forego the value of a contemporaneous record which goes so far to establish his credit as a truthful witness.

It hardly needs emphasis that the human power of recollection, especially for the spoken word, can be notoriously liable to error and, especially is this, when it relates to events of a routine nature, of a few moments duration which occurred some three years ago, in the life of a busy officer. Moreover, where, as here, the issues are of the utmost gravity, it is of the first importance that the statement alleged to have been made by the accused is proved beyond all reasonable doubt. I need hardly say that irrespective of however convinced in its own mind, the Court may be of the guilt of the accused, its findings must be based upon the evidence and nothing else.

It was with these considerations in mind that I turned to analyse the testimony of PW3.

In the first place, I have already said that he made no contemporaneous note of the words he attributed to the accused but he did make a police report some five and a half hours after determination of the interrogation of the accused at the Butterworth Police Station. This was on 19 March 1982 at 1.00 p.m.

Again, as I have also said, in it, no mention was made of any statement made by the accused at the Butterworth Police Station but there is a reference to the statement allegedly made by the accused in the room immediately preceding the recovery. The relevant part of the report reads: "Apabila masuk ke dalam bilik, Tai Mei Yuen telah menunjukkan kepada saya satu kotak speaker dan mengatakan ada di dalamnya. Saya pun membuka kotak speaker dan di dalamnya dapati sebuah beg kulit sederhana warna coklat ..."

When questioned by the Court as to this omission, he had explained, that this was due to inexperience.

He was then heavily cross-examined by Counsel for the defence as to conflicting versions he had given regarding what the accused had allegedly said to him.

First, he was asked to account for the different versions he had given in his police report and in evidence as to what the accused said in the room. It was pointed out that whereas, in his report, he had claimed in the room the accused said, when pointing to the speaker box, that, "It was in it." In examination-in-chief, the witness had said, "accused pointed to a speaker box, saying at the same time, "The pistol is kept in that box." The witness replied, "To me, there is no difference. When I used the word "it", in my report, I was referring to the pistol." He was also asked to account for the fact that whereas, in examination-in-chief, he had said at the Police Station at Butterworth, the accused had said, "Saya simpan pistol di bilik sewa kawan saya dan saya boleh tunjuk tempat itu," under cross-examination, the words attributed to the accused on this occasion were, "Saya simpan pistol di bilik sewa kawan saya di Jalan Kelab. Saya boleh tunjuk tempat itu." In other words, he was asked to account for the omission in the version given in examination-in-chief of the words, "di Jalan Kelab." The witness explained that he thought that there had been no such omission; in point of fact, however, there had been. I had taken special care, when recording this part of his evidence, to read back to the witness in open Court, the words attributed to the accused, who confirmed their accuracy.

Next, under cross-examination, the witness alleged that the accused pointed to the speaker box and said, "Pistol itu ada dalam kotak." He was then asked to account for the fact that in-chief he had claimed that what the accused said on this occasion was, "Pistol itu simpan

dalam kotak itu." This, the witness explained might have been the result of the pressures of cross-examination and that what he had said in-chief, on this point, was a complete and accurate version.

When the witness alleged that in the statement recorded from him, some two weeks after the incident, there had been quoted the words attributed to the accused, Counsel called for its production. The learned Deputy said, "I can't find a statement of this witness in this IP. It could be in IP of connected case; maybe in D17." I then directed him to call for the relevant IP.

After some time, during which I had recorded about two pages of evidence, the learned Deputy interposed to say, "I now have with me the connected IP relating P17. There is no statement by PW3 in it. Perhaps the IO, ASP Ghazali, might have taken the statement out. PW3 is listed in this IP as having given the statement." ASP Ghazali was then sent for and, in open Court, said: "I took out the statement by PW3 last week. I was going through the IP and it could have come out. I am the IO in this case."

It was then put to PW3 in cross-examination that the accused did not speak to him directly but through the interpretation of the two Chinese Special Branch Officers and this was because his Malay was poor but the witness denied this. He maintained that the accused spoke to him directly and his Malay was understandable. It was at this point, that the learned Deputy interrupted to say, "I now have the statement made by PW3. It was handed to me by ASP Ghazali a moment ago. It is dated 1 April 1982." The learned Deputy then handed the statement to the witness who, after referring to it said, "In my statement, I quoted accused as having said in the Interrogation Room, "Saya simpan pistol itu di bilik sewa kawan saya di Jalan Kelab dan saya akan bawa tunjuk."

It was then put to PW3 that at the Interrogation Room in the Butterworth Police Station, the accused had told him, through the interpretation of one of the Chinese Officers, "I can show you a place where my friend has kept his things." However, the witness replied, "No, I maintain that what he told me is what I have already said." It was then put to him that later that day, in the room, accused said, "Look into the speaker box." - at the same time pointing at the speaker box, but the witness replied, "No, I still maintain that my version is correct."

Towards the end of his cross-examination, the witness confirmed that Bah Geh, who was arrested along with the accused at the saloon on 18 February 1982, was also interrogated at the Butterworth Police Station but yet not taken to the shophouse concerned. Under cross-examination, PW3 had said at 6.10 a.m., "When I terminated the interrogation, I was not in a position to say who the other officers were who were present nor can I remember the number of officers present. I can't also say of what races they were."

The crucial issue in the case of both charges was whether the prosecution had proved possession by the accused of the offending exhibits referred to therein.

I have already said that the lynch pin in the prosecution case was the statements allegedly made by the accused, first in the Interrogation Room at the Butterworth Police Station and, then, in the room at No. 1, Jalan Kelab. The vital witness on this point was PW3. Although I had ruled during the prosecution case that these statements were admissible, that ruling was purely tentative, in view of the principles enunciated in *Haw Tua Tau's* case which, as I have said, requires me not to decide on the credibility and reliability of the witnesses for the prosecution until after I have heard all the evidence in the case and this, of course, includes the evidence adduced by the defence. It is only after this stage is reached that I am at liberty to carry out the task of evaluation of the evidence.

I had first of all, therefore, to ask myself whether it had been proved beyond all reasonable doubt that the statements allegedly made by the accused to PW3, both in the Interrogation Room at the Police Station at Butterworth and at the room at Jalan Kelab, were in fact made directly to PW3 or through the interpretation of either or both the two Chinese Special Branch Officers who the accused claimed acted as Interpreter or Interpreters as the case may be.

Having given anxious consideration to this question, I was not satisfied, so as to feel sure, that the accused spoke to PW3 directly. I considered it as likely as not that the accused spoke to PW3 through the interpretation of either or both the two Chinese Officers. I regarded with considerable scepticism the statement by PW3 that he was not in a position to say who the other officers were who were present at the end of the interrogation or his statement that he was unable to remember the number of the officers present or of what races they were.

Again, it was impossible for me to forget the visible embarrassment and the uncomfortable silence displayed by the police photographer, Detective Sergeant Goh Ah Sai (PW3), when he was cross-examined as to whether there were other officers also present in the room. I have already mentioned his sheepish reply, which he made without looking me in the eye, "I am not sure if there were other officers also present." When he was pressed as to whether or not there were also two Chinese Special Branch Officers in the room, he replied, very unconvincingly, "I am not sure. This is because I was preparing my camera." It was then put to him, categorically, that there were also two Special Branch Officers present in the room and again he answered, without any confidence, "I am not sure." There was no re-examination on this part of the cross-examination.

It was my finding that, most probably, the accused made his statements to PW3 both in the Interrogation Room and in the room at Jalan Kelab through the interpretation of either or both the two Chinese Special Branch Officers. That being so, the statements made by the accused to PW3 would be inadmissible in law by reason of the failure of these two Chinese Officers to testify: see *R. v. Attard* 43 CAR 90.

Without the statements allegedly made by the accused, the case for the prosecution collapsed, as there was nothing to connect the accused with the offending exhibits. The room was not that of the accused but of Bah Geh, who incidentally was arrested along with the accused in the saloon. There was no evidence as to whether he was charged but, the prosecution had intended making him available. However, he was apparently untraceable and so was not called. I must also repeat that although the room was locked, the accused did not have the key to it.

In case, however, it should be held, contrary to my findings, that the statements attributed to the accused were made by him not through the interpretation of either or both the two Chinese Special Branch Officers but directly to PW3, then I propose to state, by way of alternative, what my findings would be.

First, I did not regard the testimony of PW3 as to the contents of these statements as inspiring confidence. There was no contemporaneous note made by him of these alleged statements and, though in law there was no such requirement, I considered, that from an evidentiary point of view, I was entitled to rely on the omission as an element which I could take into consideration in evaluating the testimony of PW3.

Secondly, I was suspicious of PW3's version as to this part of the case, by reason of the omission from his report, made on the day of the arrest, in which, although he refers to the statements made by the accused in the room, he made no mention whatsoever of the crucial

statements allegedly made by the accused earlier that day in the Interrogation Room at the Butterworth Police Station.

Thirdly, I have already referred to the fact that when I called for the statement, it was produced only after not a little difficulty.

It will be recalled that at first, the learned Deputy was unable to produce it from his file and suggested that it might be in a connected file relating to D17. Next, shortly after that, in the course of the hearing, he checked the connected file and found that the statement was also not there. He then said that perhaps the Investigating Officer, ASP Ghazali, might have taken it out. In the end, yet a little later, Inspector Ghazali produced the statement in Court for the learned Deputy. Events such as these, though they do not in any way prove impropriety may give rise to feelings of uneasiness and indeed suspicion on the part of an observer in Court. They certainly did not help the prosecution case but, I hasten to add, that I did not place undue stress on them.

Now, it will be also recalled, that the accused's version as to what he told PW3 at the Butterworth Police Station was, to quote him, "I can take you to a room rented by my friend. You can then look for yourself what might be there." He categorically denied, saying to PW3, "Saya simpan pistol di bilik sewa kawan saya dan saya boleh tunjuk tempat itu." He maintained his knowledge of Malay was limited and he could not have used the words attributed to him. He insisted that whatever he said to PW3 was through the interpretation of the two Chinese Special Branch Officers. Similarly, recalling the events in the room at Jalan Kelab, he said, he told the Chinese Special Branch Officers, "Since you are looking for the things belonging to Lee Ah Shai, I wonder whether perhaps they might be in this box." - indicating P2.

At the end of the day, the version given by the accused both with reference to what he said at the Butterworth Police Station and, in the room at Jalan Kelab was, to my mind, in no way improbable or in any way unreasonable; especially is this so when one bears in mind the factual background of the instant case involving as it does, Lee and Bah Geh and the room which was not the accused's but occupied by more than one person. It was also a room which was locked when the police arrived and to which, as I have already said, the accused did not have the key.

Again, the accused's explanation that he was asked by Lee to convey a message to Bah Geh was never challenged in cross-examination although I should have though that this was necessary since it constituted an integral part of the defence: see *R. v. Hart* 23 CAR 202. Lee, it will be recalled, was the person who when arrested at the makan stalls at Maclister Road, implicated the accused and the learned Deputy, in his submission, conceded that the accused was arrested in consequence of information given by an accomplice.

The accused also alleged that it was Bah Geh who was the occupant of the room and this the learned Deputy said he did not dispute. The learned Deputy also submitted, (although there was no evidence to support this), that Lee was charged (see D17) with gang robbery in the course of which he had used one of the guns, the subject of the first charge.

Clearly, therefore, Lee and Bah Geh are not fictitious persons. Their involvement in this case was clear even upon the prosecution's submission. However, I would stress that I mention this only in passing as I recognised that submissions can on no account constitute evidence.

Nevertheless, a point of substance, in the prosecution case, which deserved very careful consideration, was the fact that in the room in Jalan Kelab, the accused had indicated the correct speaker box which contained the offending exhibits. The accused had admitted that he indicated one of the two speaker boxes by raising his chin. He explained, he did so, at random, adding, "I raised my chin indicating one of them, not knowing at that time what was kept in the two speaker boxes." He said although they were apart, he could not say how far apart.

Clearly, the accused could easily have denied that he indicated a particular speaker box but he chose to admit this. His statement that he raised his chin at random to indicate one of the speaker boxes, not knowing what was concealed in them, was not challenged.

It is, of course, well settled law that mere knowledge does not constitute possession. In *Yee Ya Mang v. PP* [1972] 1 MLJ 120, 121 Col. 1 para. D. Sharma, J said this:

> When, however, the accused without stating that he had concealed those articles merely produces them from a place to which other people could have access, it would not be sufficient to establish his possession even though the articles may be found carefully concealed and hidden because that is quite consistent with any other person having done so and the accused might merely have knowledge of it. In the absence of any incriminating statement made by the accused leading to the discovery of the articles, their production alone from another man's land cannot be sufficient to establish the accused's possession. It may at the most show his knowledge that the articles were concealed there. See *Emperor v. Chockhey, Trimbak v. State of Madhya Pradesh, Naurang Singh v. Emperor* and *Khuda Baksh v. King Emperor*. It is the prosecution that has to establish accused's possession apart from his knowledge.

So that even if I had to infer (which I did not) from the fact that the accused indicated the correct speaker box which contained the offending exhibits, that he knew of their presence there, that by itself, would not constitute possession in law. It was not necessarily consistent with the accused having placed the offending exhibits in that box; having regard to evidence of the surrounding circumstances, especially the role of Bah Geh and Lee, to which I have already adverted. I therefore see no reason why it could not have been Bah Geh or Lee or someone else rather than the accused who place the offending exhibits there.

It is true that neither Bah Geh nor Lee were called by the prosecution but I did not draw any adverse inference against it on this ground. The prosecution were, after all, at liberty to call only such witnesses as they thought were able to give credible and relevant evidence. Nevertheless, the onus rested on the prosecution. This meant that the defence were perfectly entitled to take advantage of any frailty which appeared in the prosecution case. Furthermore, where the evidence is circumstantial, the Court is not at liberty to bridge any material gap in the chain of evidence for this would amount to relaxing the requirements of strict proof in a criminal case.

In the result, it was my finding that the defence of the accused was reasonable and probable and more than sufficient to rebut the case of the prosecution. I accordingly had no hesitation in accepting it and entering orders of acquittal and discharged in respect of both counts.

Also found at [1990] 1 CLJ 1208